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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 703

EDGAR F. SMITH,

Petitioner,

v.

FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GRUENBERG & SCHOBEL
HAROLD GRUENBERG
721 Olive Street
St. Louis, Missouri

MOZART G. RATNER
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Edgar F. Smith, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit entered November 29, 1962, in a cause known upon the records

of that court as *In the Matter of the Application of Edgar F. Smith* for an order in the nature of a writ of mandamus directing Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois, to vacate and set aside certain orders denying petitioner's motions to dismiss a certain indictment.

OPINIONS BELOW

The opinions and orders of Judge Mercer and the orders of the Court of Appeals are not officially reported. They appear in the Appendix, *infra*.

JURISDICTION

The order of the Court of Appeals denying mandamus was issued on November 29, 1962, and an order denying petitioner's motion for an order vacating and staying notice of trial pending application for writ of certiorari and motion for stay of mandate was entered December 18, 1962. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Is denial of the only adequate remedy for (a) deprivation by a United States Commissioner of an accused's right to an opportunity to consult counsel and to a preliminary hearing and (b) infringement by a United States Marshal and a federal trial court of the constitutional guarantees of separation of powers, public trial and fair hearing on motions to dismiss an indictment, contrary to the rudimentary demands of justice and violative of the due process guarantee of the Fifth Amendment?

STATUTES INVOLVED

Federal Rules of Criminal Procedure

Rule 5(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to an-

swer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 12(b) (2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before the trial. . . .

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue. . . .

The Constitution of the United States

AMENDMENT V

No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . and to have the Assistance of Counsel for his defence.

STATEMENT

At the instance and for the advantage of the Government, for the sole purpose of tolling the statute of limitations, a Treasury agent, on February 21, 1958, executed a complaint accusing petitioner of violating the

income tax laws (A-2-3, 7-8).[1] Although the complaint on its face reflected only the agent's conclusions (A-1),[2] the United States Commissioner, without inquiry into probable cause, perfunctorily issued a complaint thereon (A-8-9, A-2), pursuant to which petitioner was arrested on February 24, 1958, by the then Deputy United States Marshal (A-2, E-18).

The Commissioner, before whom petitioner was brought, refused to release him from custody unless and until he decided whether or not he would waive preliminary hearing (B-10-11, C-13-14, E-19-20). Petitioner pleaded for an opportunity, before deciding, to consult counsel whom he had summoned (*ibid.*). Although informed that petitioner's counsel was due that afternoon, the Commissioner took the position that he could not or would not admit petitioner to bail until he made a decision (*ibid.*). In consequence, and under the impression conveyed by a bondsman that a "preliminary hearing doesn't mean much, nearly everybody waives" it (E-3), before his counsel arrived petitioner "waived" preliminary hearing (B-10-11, C-13-14, E-19-20).[3]

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[1] The abbreviations used herein refer to the record as follows: "Pet.," the Petition for Writ of Mandamus; "A-1-J-36," the Appendix thereto, and "Br.," the supporting Brief filed in the court below.

[2] The complaint did not even identify the two individuals, both convicts, upon whose uncorroborated stories the agent later testified his conclusion was based (A-4-7, 9).

[3] This is the version of the Marshal, favorable to the Commissioner, credited by Judge Mercer. Defendant attests and the Marshal denies that the Commissioner also urged him to waive preliminary examination and advised him that "the hearing is merely a formality and your case could not be decided at a hearing." (B-11, E-20).

Five months later, on July 8, 1958, no preliminary hearing having been held, petitioner was indicted on the same accusation (Pet. 1).[4] He filed a motion to dismiss, supported by affidavits, contending that deprivation of his rights to preliminary examination and to counsel invalidated the indictment (A-9a, C-14). The motion was argued orally before Judge Poos on September 4, 1959, at which time the Marshal was in the courtroom (H-26). Sometime thereafter the Marshal approached the Judge *ex parte, in camera*, advised him that petitioner's version of the facts was incorrect and recounted his own (*ibid.*). Judge Poos listened and, *sua sponte*, scheduled a hearing (*ibid.*). Upon convening court on June 1, 1960, he revealed what had transpired and explained that his purpose was to put the Marshal's story, which he thought exonerated the Commissioner, on record (D-15-17). When petitioner's counsel objected, the Judge granted a month's postponement but directed the United States Attorney in the interim to obtain and file an affidavit of the Marshal (*ibid.*).

Petitioner thereupon filed a second motion to dismiss (F-22), charging, *inter alia*, commingling of prosecution and judicial functions, and requesting, alternatively, that the Marshal's affidavit be stricken and that the Marshal be disqualified as a witness because of his unlawful approach to the court. Without passing on any of petitioner's motions, Judge Poos recused himself (G-23-24). His successor, Judge Mercer, heard oral argument on February 17, 1961 and on May 2, 1961, issued an opinion denying the second

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[4] Although the indictment covers three years rather than only one, it is predicated on the same alleged course of continuing misconduct (Pet. 1-2).

motion on the ground that recusement dissipated all prejudice to petitioner and that the Marshal's misconduct affected only the weight, not the admissibility, of his testimony (II-25-29). In his view, depriving the prosecution of the fruits of official wrongdoing is a policy limited to invasions "of the constitutional and legal rights of the individual to be secure in his person and his home" (II-28, 29). "If the exclusionary rule were to be applied to the circumstances disclosed by this record, then every human error by a federal official which remotely related to testimonial evidence would lead to the suppression of the evidence to which it relates" (II-29).

On May 8, 1962, Judge Mercer heard argument on the initial motion to dismiss (I-30-33). He concluded (I-34-35), that, on the Marshal's version, petitioner "was not . . . prejudiced in any degree by any errors or omissions in the preliminary hearing to the extent that it would justify the dismissal of these indictments" [sic] (I-34). He upheld the "waiver" on the ground that petitioner was not "a babe in the woods . . . one of those unfortunate creatures of society that had a mentality whereby he didn't know what was going on." (*Ibid.*) Although Judge Mercer considered the conflict between petitioner's affidavit and the Marshal's crucial, he refused to hold a hearing on the credibility issue, refused to permit cross-examination of the Marshal, and held that a presumption of official regularity attaching to the Commissioner's conduct justified crediting the Marshal's affidavit (I-34-35).

On October 2, 1962, the case was set for jury trial on January 14, 1963 (Pet. 5-6). On October 30, 1962, petitioner filed in the Court of Appeals for the Seventh

Circuit a petition for writ of mandamus to compel granting of the motions to dismiss the indictment and other relief. Without eliciting a response, and without hearing argument, that court, on November 29, 1962, denied the petition. On December 18, 1962, that court denied petitioner's motion for an order vacating and staying the notice of trial pending application to this Court.

REASONS FOR GRANTING THE WRIT

1. The first phase of the question is whether deprivation of the rights[5] to an opportunity to consult counsel and to a preliminary hearing can be adequately remedied short of barring trial on a post-violation indictment. The constitutional imperative of enforcing Rule 5(b) and (c) requires that the writ issue to consider that question. Those Rules, like Rule 5(a), are "part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement." *Mallory* v. *United States*, 354 U.S. 449, 453 (1957). "The power of the federal courts extends to policing those requirements and making certain they are observed. . . . Federal courts sit to enforce federal law. . . . The obligation

[5] We contend that the right not to be denied reasonable opportunity to consult counsel at any stage of proceedings and on any question before the Commissioner is guaranteed not only by the Rules but by the Sixth Amendment (Br. 10-12). We also contend that as long as the right to preliminary hearing is guaranteed by the Rules, illegal deprivation offends not only the statute but the due process guarantee of the Fifth Amendment. *Frank* v. *Mangum*, 237 U.S. 309, 327-328 (1915); *Boykin* v. *Huff*, 73 App. D.C. 351, 358, 121 F. 2d 865, 872 (1941). None of the cases which hold that the Constitution does not guarantee a right to preliminary hearing reach that important question. See, *e. g.*, *United States ex rel Kassin* v. *Mulligan*, 295 U.S. 396, 400 (1935); *United States* v. *Brace*, 192 F. Supp. 714, 715 (D. Md. 1961).

of the [United States Commissioner] is to obey the Rules. They are drawn for the innocent and guilty alike. They prescribe standards for law enforcement. . . . [Their policy] is defeated if the [Commissioner] can flout them. . . ." *Rea* v. *United States*, 350 U.S. 214, 217 (1956). What is the consequence of flouting Rules 5(b) and (c) is manifestly a problem of major importance in the administration of criminal justice which this Court should resolve "at the earliest opportunity." *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956).

(a) Even the Marshal's version shows flouting—malicious, or heedless at best. The draftsmen of the Rules understood that it is "a matter for expert advice" whether the right of cross-examination and disclosure of the defense at a preliminary hearing should be exercised or waived. Orfield, *Criminal Procedure From Arrest to Appeal* (1947), p. 80. "The defendant who is not legally represented is not usually sufficiently acquainted with the procedure to understand the choice he is asked to make." Jackson, *The Machinery of Justice in England* (1st Ed., 1940), p. 121. To guard against premature election without consulting counsel, the draftsmen deliberately deleted from the final draft of Rule 5(b) a provision "that the Commissioner also inform the defendant of the right to 'waive' a preliminary examination." 4 Barron, *Federal Practice and Procedure* (Rules Ed. 1951), Ch. 18, § 1873, p. 36, n. 30. At the same time, in the same sentence, they guaranteed both opportunity to consult counsel and admission to bail.

By posing and insisting that petitioner decide the preliminary hearing question as a condition of admission to bail (E-19-20), the Commissioner turned the

offer of bail into a weapon for destroying the guarantee of "reasonable time and opportunity to consult counsel." He made complementary and cumulative rights inconsistent and self-defeating. In reliance upon the resulting involuntary and invalid "waiver,"[6] the Commissioner repudiated his plain duty under Rule 5(c) to "hear the evidence" within "a reasonable time." The "degree of prejudice can never be known." *Hamilton* v. *Alabama*, 371 U.S. —— (1962).

(b) Scholars agree that the modern purpose of a preliminary hearing is to afford the accused an opportunity to avoid the obloquy, burden and expense of a trial.[7] Orfield (*op. cit. supra*, n. 7) says:

> ". . . Today this hearing is almost wholly for the benefit of the defendant, whereas historically it was for the benefit of the prosecution. . . . Its basic purpose is to save the defendant the annoyance and costs of having to defend himself against further proceedings, unless there is enough evidence to indicate at least a probability that he is guilty. . . . Those who made the accusation are forced to state their case. The defendant is given an opportunity to correct any misconceptions which may have arisen with respect to his conduct. He

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[6] Since the Commissioner had no right to put the question, much less demand an answer (cf. *Wood* v. *United States*, 75 App. D.C. 274, 286, 128 F. 2d 265, 277 (1942)), the "waiver" would have been invalid even if petitioner had been arrested lawfully. *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957). Since defendant was in custody unlawfully (*Giordenello* v. *United States*, 357 U.S. 480, 486-487 (1958)), the waiver was, *a fortiori*, involuntary and invalid.

[7] Orfield, *Criminal Proceedings From Arrest To Appeal* (1947), pp. 67-68, 72-73; Miller, Justin, *The Preliminary Hearing*, 15 A. B. A. J. 414 (1929); Puttkammer, *Administration of Criminal Law* (1953), pp. 91 *et seq*; Br., pp. 7-8.

> is offered prompt protection against viciousness, ignorance, or weakness on the part of the police or of the prosecution, who may have acted under the influence of persons having a selfish interest. If he is clearly innocent he may be spared the ignominy resulting from a trial. . . ."

1 Alexander, *The Law of Arrest* (1949), Section 174, p. 664, states:

> "The purpose of a preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point * * *."

Establishment by statute of a duty to hold a preliminary hearing operates, therefore, *pro tanto*, as rejection of the "astonishingly callous argument" (*In Re Fried*, 161 F.2d 453, 458 (2d Cir. 1947), opinion of Frank, J.), that trial on the merits can do no legal harm.

Unless violation of that duty bars subsequent indictment for the offense, defendant's right to a preliminary hearing is an unenforceable mockery. Exoneration after trial on an indictment would be a consequence, not a remedy, of the illegal deprivation.

> "[A] wrongful indictment . . . often . . . works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal. . . ." *In Re Fried*, *supra*.

Prohibition of post-violation indictment is the only effective deterrent to denial of the right by the Commissioner, just as the exclusionary rules are the only effective deterrent to police wrongdoing. *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961); *Elkins* v. *United States*, 364 U.S. 206, 217-218 (1960); *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); *Byars* v. *United States*, 273 U.S. 28, 33 (1927). To countenance violation of duty by a United States Commissioner makes the court itself "the instrument of wrong." *Sorrells* v. *United States*, 287 U.S. 435, 456 (1932) (separate opinion of Roberts, J.). If the "spectacle of Government officers breaking the law obviously breeds contempt for the law" (*Killough* v. *United States*, No. 16398, App. D.C., decided October 4, 1962, separate opinion of Wright, J., p. 25), the spectacle of a United States Commissioner doing so much be even more "contagious." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *McNabb* v. *United States*, 318 U.S. 332, 345 (1943); Notes of the Advisory Committee on Rule 5(b) and (c).

Since the Commissioner is an "inferior officer" (*Go-Bart Co.* v. *United States*, 282 U.S. 344, 352-354 (1931)), of the court itself (*Wood* v. *United States*, 75 App. D.C. 274, 283-286, 128 F.2d 265, 274-277 (1942), his unlawful denial of preliminary examination, like his denial of "reasonable opportunity to . . . consult with counsel" (*Powell* v. *Alabama*, 287 U.S. 45, 52, 59, 71 (1932); *Glasser* v. *United States*, 315 U.S. 60, 76 1942); cf. *Crooker* v. *California*, 357 U.S. 433, 439 (1958)) must deprive the court of "jurisdiction to proceed." *Johnson* v. *Zerbst*, 304 U.S. 458, 463, 467, 468 (1938). In this context, loss of "jurisdiction" must mean that the court becomes powerless to entertain a subsequent indictment embodying the same ac-

cusation, for proceedings "before a United States Commissioner . . . are parts of the federal prosecutorial system leading to a criminal trial." *DiBella* v. *United States*, 369 U.S. 121, 131 (1962).

Indictment after unlawful deprivation of preliminary hearing cannot be divorced from the Commissioner's infringement on the theory that the grand jury "would have found the indictment" anyway; "it is not for the court to say whether they would or not." *Ex Parte Bain*, 121 U.S. 1, 9-10 (1887). Experience teaches that the defendant may well have been "spared." (p. 11, *supra*). Demonstration of the weakness of the case at preliminary hearing might even induce the prosecutor to refrain from seeking an indictment (Br., p. 8).

In any event, deprivation of the right to preliminary hearing prejudices defense on the merits. If the accused had been accorded his legal right to cross-examine the prosecution witnesses at a preliminary hearing he would be in a far better tactical position at trial. If Government does not want to risk according the accused that advantage, it must refrain from presenting the case to the Commissioner. Miller, *The Preliminary Hearing*, 15 A.B.A.J. 414, 415 (1929). Illegal deprivation must cost the Government its right to proceed. Cf *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957); *Jencks* v. *United States*, 353 U.S. 657, 671-672 (1957); *United States* v. *Heath*, 260 F.2d 623, 626, 628-629 (9th Cir. 1958).

The resulting "amnesty" cannot constitutionally be avoided for "there is no other way by which the accused can secure that protection which the law professes to accord him." *United States* v. *Coplon*, 185 F.2d 629, 640 (2d Cir. 1950), cert. denied 342 U.S. 920;

Nardone v. *United States,* 302 U.S. 379, 383 (1937). Nor can it reasonably be argued that the remedy is too "drastic." "The Government of a strong and free nation does not need [and] cannot afford to abide with" (*Mesarosh* v. *United States,* 352 U.S. 1, 14 (1956)), any prosecution consequent upon deprivation of the opportunity accorded the accused by law to avoid it. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of . . . prohibitions . . . intended for the protection of the people against such unauthorized action." *Weeks* v. *United States,* 232 U.S. 383, 394 (1914).

(c) Minimization of the consequences of unlawful deprivation of preliminary hearing appears to reflect a widespread misconception (A-2) that the sole purpose of the hearing is to determine whether defendant should be released from custody.[8] This assumption, which mutilates and nullifies the guarantee, confuses the object of preliminary hearing with the object of prompt arraignment and admission to bail. The confusion is strikingly evident in the *Gray* case, *supra*, n. 8, where Judge Holtzoff held that the right to preliminary hearing was *functus officio* because "defendant had been given bail." The confusion is likewise evident in the opinion of the Court of Appeals in *Goldsmith* v. *United States,* 107 App. D.C. 305,

[8] See, e.g., *Barber* v. *United States,* 142 F.2d 805, 807 (4th Cir. 1944); *Boone* v. *United States,* 280 F.2d 911 (6th Cir. 1960); *United States* v. *Gray,* 87 F.Supp. 436, 437 (D. D.C. 1949); *United States* v. *Lucas,* 13 F.R.D., 177 (D. D.C. 1952), aff'd, 201 F.2d 182, 91 U.S. App. D.C. 278; *United States* v. *Brace,* 192 F.Supp. 714, 715 (D. Md. 1961); cf. Williams, *One Man's Freedom* (1962), pp. 170-171. The "partially inconsistent and conflicting purposes [of preliminary examination] have been responsible for some of the confused and inconsistent thinking that characterizes the subject." Puttkammer, *op. cit. supra,* note 7, p. 91.

308-309, n. 2a, 277 F.2d 335, 338-339, n. 2a (1960), cert. denied, 364 U.S. 863, where prompt preliminary arraignment is confused with prompt preliminary hearing *after* arraignment. To telescope the two is to obliterate distinctions which Rule 5 deliberately draws.

Rule 5(a) guarantees that a person arrested upon a complaint be brought before the Commissioner "without unnecessary delay." Rule 5(b) requires the Commissioner to "inform the defendant . . . of his right to legal counsel and of his right to have a preliminary examination . . . [and] allow the defendant reasonable time and opportunity to consult counsel and . . . admit the defendant to bail. . . ." Rule 5(c) requires the Commissioner to "hear the evidence within a reasonable time [permitting the] defendant [to] cross-examine witnesses against him and . . . introduce evidence in his own behalf." The Rule 5(c) guarantee, vouchsafed to defendants who, by hypothesis, have already been admitted to bail pursuant to Rule 5(b), requires implementation and effectuation by this Court to combat "the unfortunate and wholly mistaken tendency * * * to regard the preliminary examination as of little real importance." Puttkammer, *Administration of Criminal Law* (1953), p. 96.

The argument for nullification of the right to preliminary hearing confuses lawful circumvention of the guarantee by the prosecution with violation of Rule 5(c) by the Commissioner. Of course, if the Government elects to proceed without a complaint the right to preliminary examination never arises.[9] And the

[9] *United States ex rel. Kassin* v. *Mulligan*, *supra*, n. 5, p. 8; *United States* v. *Tees*, 211 F.2d 69, 72 (3d Cir. 1954); *United States* v. *Shields*, 291 F.2d 798-799 (6th Cir. 1961), cert. denied, 368 U.S. 933.

right can apparently be defeated legally by return of an indictment within "a reasonable time" because the Rules do not make a complaint a bar to presentation of evidence to a grand jury before preliminary hearing,[10] and do not require the Commissioner to hold a hearing short of "a reasonable time."[11] But, if the defendant does not voluntarily and validly waive preliminary hearing, failure of the Commissioner to hear the evidence within a reasonable time necessarily infringes the right because it violates the Commissioner's plain duty. Unless omission under these circumstances is infringement, the right to preliminary examination is completely a mirage. "A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

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[10] *United States* v. *Brace*, 192 F.Supp. 714, 716 (D. Md. 1961); *United States* v. *Vasquez*, 25 F.R.D. 350 (S.D.N.Y. 1958), cert. denied 365 U.S 887; *United States* v. *Universita*, 192 F.Supp. 154 (D.C.N.Y. 1961).

[11] It does not follow, however, as the Government and the courts appear to believe (*James* v. *Lawrence*, 84 App D.C. 355, 176 F.2d 18, 20 (1949); *United States* v. *Gray*, 87 F.Supp. 436-437, 438 (D. D.C. 1949); *United States* v. *Universita*, 192 F.Supp. at 156), that the Commissioner is entitled to grant continuances for the benefit of the Government. That would permit the prosecutor and the Commissioner to transform a right granted for the benefit of the accused into a detriment. To allow the prosecution to enjoy the benefits of the complaint procedure without its burdens is the epitome of injustice. *United States* v. *Worms*, Fed. Cas. No. 16,765 (1859).

The legitimate "value" of preliminary hearing to the prosecution is that it "offers a method for testing the complaints of prosecuting witnesses, ascertaining their motives, and eliminating prosecutions based upon misinformation or prejudice. It also affords an opportunity for compelling unwilling or unfriendly witnesses to testify, thus revealing the existence or nonexistence of criminal offenses." Orfield, (*op. cit. supra*, n. 7, p. 10), p. 73.

2. The second phase of the question is whether remedy for infringement of the constitutional guarantees of separation of powers, public trial and fair hearing in processing motions to dismiss can justly and constitutionally be deferred until after trial on the merits. Since observance of these constitutional safeguards might result in dismissal before trial, the answer must be no; the Government cannot be allowed to benefit, or the accused to suffer, from official wrongdoing. On the undisputed facts, the violations are incontrovertible.

(a) The Marshal abused his official position, his familiarity with and access to the Judge, to prejudice the accused's case. Nevertheless, actually condoning, on the theory that the error was "human" and that the accused was not prejudiced[13] (II-27, 28, 29), while professing (II-28), not to condone the offense to the administration of justice, Judge Mercer not only refused to suppress but credited the Marshal's testimony, and even shielded him from cross-examination (II-28-29, I-33-34). He thereby flouted the teaching of *McNabb*, 318 U.S. 332, 343:

> "Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as despotic."

Judge Mercer's distinction limits the exclusionary rule to investigations, exempting all other offenses against the administration of justice. Cf. *Killough* v. *United*

[13] Cf. *Coplon* v. *United States*, 89 App. D.C. 103, 113, 191 F.2d 749, 759 (1951), cert. denied, 342 U.S. 926, holding that interception of telephone communications between a defendant and his counsel, without any showing of prejudice, is no mere "ethical wrong." See also, Br., pp. 6; 9, 12, 20-27.

States, No. 16398, App. D.C., 1962, p. 14. However, if, as *Mapp* and *Elkins* emphasize, judicial integrity must be protected against investigative wrongdoing in which the court plays no part at all, *a fortiori*, must it be protected against wrongdoing which does involve the court. To balk at applying the exclusionary rule under the circumstances of this case invites suspicion of judicial disinterestedness.

(b) Although "the onus was imperatively upon the trial judge to interrupt" (*Levine* v. *United States*, 362 U.S. 610, 619 (1960)), Judge Poos listened, evaluated the Marshal's story, scheduled a hearing to put it on record and directed the prosecutor to introduce it in the form of an affidavit. To treat recusement as a remedy for that offense is to overlook ineradicable violation of the constitutional guarantees of public trial and separation of functions (Br. 13-18). Recusement may avoid prejudice flowing from bias; it cannot possibly cancel the private rehearsal or undo the commingling. Where such rights are infringed there is "no room for an inquiry whether prejudice to a defendant has been wrought through their denial." *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934). "We cannot dispense with constitutional privileges because in a special instance they may not in fact serve to protect any valid interest of their possessor." *United States* v. *Coplon*, 185 F.2d 629, 683 (2d Cir. 1950), cert. denied, 342 U.S. 920.

(c) Judge Mercer's refusal to permit cross-examination of the Marshal and his invocation of a presumption "that every officer is presumed to do his duty" comes dangerously close to "the King can do no wrong." If there is any abuse of discretion offensive to

constitutional liberty against which this Court should be alert to guard, this is it.

3. Since dismissal before trial of a post-violation indictment is the only adequate remedy for deprivation of the rights to consult counsel and to preliminary examination, and granting motions to dismiss before trial is the only adequate remedy for their unconstitutional denial, refusal of that relief is a plain "abuse of judicial power" (*Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953)), which must necessarily be corrected by mandamus if constitutional right and statutory policy are to prevail.[13] *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 204 (1945); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506, 511; cf. *Capital Service* v. *N.L.R.B.*, 347 U.S. 501, (1954); *Ex Parte Bain*, 121 U.S. 1, 11-14 (1887); *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1944). "To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guarantee specifically designed to prevent injustice." *Johnson* v. *Zerbst*, 304 U.S. 458, 467 (1938).

The considerations which militate against piecemeal review and "truncated presentation" of issues in criminal cases do not warrant or permit postponement here

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[13] The abstention of the court below is in glaring contrast with the position of the Second Circuit which declared recently (Br., p. 29 and Exhs. 1 and 2) that it would issue mandamus to compel granting of a motion to dismiss an indictment before trial if the evidence adequately established that the prosecution had divulged grand jury proceedings to the press. It is no objection that to compel dismissal is in effect to enjoin prosecution for there are "circumstances under which a court of equity will enjoin criminal prosecution." *Pawling* v. *Eastland*, 109 App. D.C. 342, 345, 288 F.2d 126, 129 (1960), cert. denied 364 U.S. 900; *United States* v. *Heath*, 260 F.2d 623, 626 (9th Cir. 1958).

(Orfield, *Criminal Appeals in America* (1939), p. 93), for the issues presented by the motions to dismiss are not "involved in" or "part of" the merits, and the "practical effect" of denying relief "will be irreparable by any subsequent appeal." *DiBella* v. *United States*, 369 U.S. 121, 126, 127-128-129 (1962). Moreover, "if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss . . ." surely "[i]t would be a useless waste of time and effort to enforce a trial. . . ." *In Re Skinner & Eddy Corporation*, 265 U.S. 86, 96 (1924). To fail to halt before trial a prosecution which cannot possibly result in a valid conviction is to defeat petitioner's "substantial right" to a dismissal. To allow such defeat is to abdicate the function of supervision of the administration of criminal justice.

In this Court's view "the history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb* case, 318 U.S. 332, 347 (1943). One cannot escape the impression that those who made and reviewed this record hold that view lightly when it pinches.

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Control Board*, 351 U.S. 115, 124 (1956).

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted and appropriate relief ordered.

Respectfully submitted,

GRUENBERG & SCHOBEL
HAROLD GRUENBERG
721 Olive Street
St. Louis, Missouri

MOZART G. RATNER
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioner